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IN THE

Supreme Court of the United States

KRISTEN DAY, *et al.*,
Petitioners,

v.

RICHARD BOND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, THOMAS BRENNAN, ZAN BRENNAN, BRIGETTE BRENNAN, AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. In a case challenging – as a violation of federal statutory law – a Kansas statute that grants in-state tuition rates to certain illegal aliens who are not domiciliary residents of Kansas but denies those rates to the U.S. citizen claimants, does the claimants' Article III standing depend on a federal court's assessment of whether the federal statute confers a private right of action on the claimants?

2. In a case challenging the Kansas statute as a violation of the claimants' rights under the Equal Protection Clause, where the federal appeals court determines that the claimants have suffered "injury in fact" because the statute denies them the ability to compete on an equal footing for in-state tuition rates, do the claimants establish the "redressability" required for Article III standing purposes by establishing that their requested relief would place them on an equal footing with illegal aliens in terms of seeking in-state tuition rates?

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BRIEF OF WASHINGTON LEGAL FOUNDATION, THOMAS BRENNAN, ZAN BRENNAN, BRIGETTE BRENNAN, AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 States.[1] WLF devotes a significant portion of its resources to protecting the constitutional and civil rights of American citizens and aliens lawfully in this country. *See, e.g., Podberesky v. Kirwan,* 38 F.3d 147 (4th Cir. 1994) (successful challenge to university's denial of scholarship benefits to Hispanic student on account of race), *cert. denied*, 514 U.S. 1128 (1995). On August 9, 2005, WLF filed a complaint with the U.S. Department of Homeland Security (DHS), challenging Texas's policy of favoring illegal aliens over U.S. citizens in the award of in-state tuition rates at colleges and universities. On September 7, 2005, WLF filed a complaint with DHS, challenging a similar policy in the State of New York.

Brigette Brennan recently completed her undergraduate studies at the University of Kansas (KU). She grew up in the State of Missouri. Although she lived in Missouri during her high school years, she

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondents and Intervenor-Respondents with notice of intent to file.

attended and graduated from Bishop Miege High School – which is located across the border in Kansas. She moved to Lawrence, Kansas to attend KU and lived there throughout her years as a college student. While enrolled as a student, she repeatedly asked to be allowed to pay college tuition at in-state rates but was told by KU officials that she did not qualify for those rates despite living in Kansas and having graduated from a Kansas high school. She believes that Respondents violated her rights under federal law and the U.S. Constitution by charging her higher tuition rates than they charged to illegal aliens who attended KU during the same time period.

Thomas and Zan Brennan are the parents of Brigette Brennan and are residents of Kansas City, Missouri. They provided Brigette with financial support to assist her with the cost of attending KU. Those costs were significantly higher than they would have been had KU offered Brigette the same discounted tuition rates that they offer to all illegal aliens who, like Brigette, graduated from a Kansas high school.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in state and federal courts on civil rights issues on a number of occasions.

Amici are concerned that Kansas has adopted a policy that discriminates against U.S. citizens in favor of aliens who are in this country illegally and are not domiciliary residents of Kansas. *Amici* are also

concerned that the decision below denies Petitioners and similarly situated U.S. citizens any recourse against the injury inflicted on them by that discrimination, even though such discrimination is explicitly banned by a federal statute. Indeed, the Tenth Circuit's pinched views regarding the scope of Article III standing makes it much more difficult for those residing within that circuit to obtain redress of their grievances than it is for those living elsewhere in the country, whatever the nature of their grievances.

STATEMENT OF THE CASE

Kansas law provides that, in general, those attending public colleges and universities in Kansas qualify as "residents for fee purposes" (and thus qualify for significantly reduced tuition rates) only if they "have been domiciliary residents of the state of Kansas for at least 12 months prior to enrollment." K.S.A. § 76-729. Although it is theoretically possible for those who first move to Kansas for the purpose of attending college to later qualify as "residents for fee purposes," regulations adopted by Kansas make it exceedingly difficult for them ever to do so. *See* K.A.R. § 88-3-2. Kansas does not deem any of the Petitioners who are college students to qualify as "residents for fee purposes" within the meaning of the statute and regulations. *Amici* do not understand any of the Petitioners to contest that determination, or to challenge Kansas's right to charge them higher tuition rates than it charges domiciliary residents of the State.

Petitioners do object, however, to being charged higher tuition rates than another group of students who do not qualify as "domiciliary residents" of Kansas:

illegal aliens. Certain illegal aliens became eligible for reduced tuition rates as the result of Kansas's adoption of K.S.A. § 76-731a, which took effect on July 1, 2004. Section 76-731a, entitled "Certain persons *without lawful immigration status* deemed residents for purposes of tuition and fees" (emphasis added), provides that an individual "shall be deemed to be a resident of Kansas for the purposes of tuition and fees" if (s)he meets various requirements set forth in the statute. The principal requirements are that one has graduated from a Kansas high school (or has obtained a GED certificate issued in Kansas) and attended high school in Kansas for at least three years. § 76-731a(b)(2)(A) & (B).[2] U.S. citizens who do not qualify for reduced tuition under § 76-729 (*i.e.*, those who are not domiciliary residents of Kansas) have no hope of qualifying under § 76-731a, because the latter statute disqualifies anyone who qualifies for in-state tuition rates at another State's colleges and universities, and every U.S. citizen qualifies as a domiciliary resident of at least one state. *See* § 76-731a(c)(2). For example, Brigette Brennan did not qualify for reduced in-state tuition rates under § 76-731a despite having graduated from a Kansas high school, because she would have qualified for in-state tuition rates at a Missouri college.

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[2] It is more than just the title of § 76-731a that makes plain that the statute was adopted for the purpose of assisting illegal aliens (as well as aliens with a "nonpermanent immigration status") who graduate from Kansas high schools. Another indicator of that purpose is the statute's provision that, to qualify for reduced tuition rates, illegal aliens must sign an affidavit indicating that they have filed (or will file as soon as they are eligible to do so) an application to legalize their immigration status. *See* § 76-731a(b)(2)(C).

Petitioners filed suit in 2004 in federal court against a variety of Kansas officials,[3] alleging that Kansas was improperly discriminating against them by charging them higher tuition and fees than it charges illegal aliens who graduated from Kansas high schools. They alleged *inter alia* that this discrimination violated their rights under the Equal Protection Clause of the Fourteenth Amendment as well as 8 U.S.C. § 1623, which provides:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

The complaint sought an injunction against Kansas's use of § 76-731a to continue such discrimination.[4] Kansas could, of course, end its discrimination in one of two ways: it could either cease offering discounted in-state tuition rates to illegal aliens, or it could offer those same rates to Petitioners and all other U.S. citizens.

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[3] *Amici* hereinafter refer to those officials collectively as "Kansas."

[4] The complaint also sought an injunction requiring Kansas to refund excess tuition payments made by Petitioners. The existence of this restitution claim ensures that Petitioners' complaint cannot be rendered moot after they graduate from college.

In July 2005, the district court granted motions to dismiss filed by Kansas and by two organizations that intervened as defendants. Pet. App. 28a-62a. The court held that Petitioners had standing to assert a violation of 8 U.S.C. § 1623 (Count 2). *Id.* 50a. It nonetheless dismissed Count 2 on the ground that § 1623 does not create a private right of action. *Id.* 49a-55a.[5] Rather, the court ruled, only the U.S. Department of Homeland Security (DHS) may enforce § 1623. *Id.* 53a-54a.

The district court also concluded that Petitioners lacked standing to raise an equal protection challenge to the discriminatory tuition policy (Count 7) because they could demonstrate neither injury-in-fact nor redressability. *Id.* at 59a-61a. It concluded that Petitioners had failed to establish injury-in-fact because they could not "demonstrate that K.S.A. 76-731a has any application to them"; rather, the court concluded, they were denied in-state tuition on the basis of lawful, nondiscriminatory provisions of K.S.A. § 76-729. *Id.* 59a-60a.[6] The court concluded that Petitioners had

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[5] The court did not address Petitioners' claim that 42 U.S.C. § 1983 creates an express right of action for violations of § 1623.

[6] The court viewed § 76-729 as establishing a baseline rule that only those who are domiciliary residents of Kansas are entitled to reduced tuition rates. *Id.* The court described § 76-731a as simply one of many exceptions to that baseline rule. Although acknowledging that Petitioners were not among those who benefitted from § 76-731a, the court said that the statute's creation of an exception "allow[ing] undocumented aliens to pay in-state tuition rates did nothing to change the situation of [Petitioners]." *Id.* 59a. In other words, Petitioners were no worse off than if § 76-731a had never been adopted.

failed to establish redressability because even if it were to strike down § 76-731a, Petitioners would not benefit because they still would be paying out-of-state tuition. *Id.* at 36-37.[7]

The Tenth Circuit affirmed, albeit on somewhat different grounds. *Id.* 1a-27a. The appeals court held that Petitioners lacked Article III standing not only with respect to their equal protection claim, *id.* 10a-17a, but also with respect to their claim under 8 U.S.C. § 1623. *Id.* 17a-26a.

With respect to standing to assert the equal protection claim, the appeals court held (contrary to the district court) that Petitioners had adequately alleged injury-in-fact. *Id.* 14a. The court held that two of Petitioners' theories of injury were "sufficiently concrete, particularized, and nonspeculative to support injury." *Id.* The two claimed injuries deemed adequate by the court were:

- Denial of equal treatment under K.S.A. § 76-731a, which grants in-state tuition rates to many illegal aliens who are not (by definition) domiciliary residents of Kansas, while making it

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[7] The district court also held that five other claims raised by Petitioners – Counts 1, 3, 4, 5, and 6 – should be dismissed for lack of Article III standing. *Id.* 43a-49a. One of these five claims – Count 4 – raised a generalized claim that all of the federal statutes relied upon by Petitioners in other counts, including 8 U.S.C. § 1623, when considered in combination required a conclusion that Congress had intended to preempt state statutes such as K.S.A. § 76-731a. Petitioners appealed from the dismissal of Counts 2 and 7 but not from dismissal of the other five claims.

virtually impossible for nonresident U.S. citizens to qualify for reduced rates under the statute; and

- The requirement that Petitioners pay extra tuition while enrolled in Kansas universities, a result of their failure to qualify for reduced tuition rates under § 76-731a.

Id. 11a.

The appeals court nonetheless held that Petitioners failed to establish Article III standing to raise their equal protection claims, because their injuries were not directly traceable to the complained-of action, nor would the requested relief (an injunction against enforcement of § 76-731a) redress their injuries. *Id.* 14a-17a. The appeals court explained that an injunction barring illegal aliens from using § 76-731a to obtain lower tuition rates would be of no benefit to Petitioners – Petitioners would still be paying tuition at higher, out-of-state rates. *Id.*

With respect to Count 2 – Petitioners' claim under 8 U.S.C. § 1623 – the appeals court never reached the issue decided by the district court: whether Congress granted a private right of action to enforce the statute. Instead, the court held that Petitioners lacked standing to raise the § 1623 claim. *Id.* 23a-26a.[8] In

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[8] The appeals court expressed some confusion regarding the nature of the claim raised by Count 2 and the relief sought. *Id.* 18a n.6. Although the basis for that confusion is unclear, the court nonetheless accurately described the injunctive relief sought by both Count 2 and Count 7: "invalidation of § 76-731a." *Id.*

arriving at that determination, the court failed to undertake the traditional three-part analysis used to determine Article III standing (injury-in-fact, traceability, and redressability). Rather, it summarily concluded that Petitioners lacked standing to allege a violation of § 1623 because that statute does not "vest[] in them private rights." *Id.* 25a.

In December 2007, the appeals court denied petitions for panel rehearing and rehearing *en banc*. *Id.* 93a-102a. The order denying the petitions focused almost exclusively on the § 1623 claim and Petitioners' assertion (not at issue in this petition) that injured plaintiffs need not demonstrate that a federal statute creates a private right of action in order to state a claim that the statute preempts conflicting state law. In sharp contrast to its earlier decision, the panel now explained that its decision to deny standing on Count 2 was based on Petitioners' alleged failure to demonstrate injury-in-fact. *Id.* 99a, 101a. According to the court, the *only* injury alleged by Petitioners to have been inflicted on them by the statute challenged under Count 2 (K.S.A. § 76-731a) was a violation of statutory rights conferred on them by 8 U.S.C. § 1623. *Id.* 101a.[9] The court

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[9] The court did not explain the apparent contradiction between that assertion and the finding in its initial opinion that Petitioners had adequately alleged that K.S.A. § 76-731a had caused them injury-in-fact. *Id.* 11a, 14a. Any injury-in-fact inflicted on Petitioners by virtue of § 76-731a would, of course, be as adequate for establishing standing to raise a challenge to that statute under § 1623 as it would be for establishing standing to raise a challenge to that statute under the Equal Protection Clause.

The appeals court may have been confused as to the nature of Petitioners' claimed injury with respect to Count 2 by the fact

mentioned the equal protection claim only in passing, noting without discussion that its prior decision had held that Petitioners' assertions were insufficient to establish standing with respect to that claim. *Id.* 101a n.5.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. In dismissing Petitioners' claims, the Tenth Circuit has set forth a novel theory of Article III standing that significantly impairs the ability of litigants to establish their standing. The decision below widens the split between the Tenth Circuit and at least four other federal appeals courts regarding the prerequisites for establishing Article III standing. As the Petition amply demonstrates, review is warranted to resolve that conflict.

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that the issue of standing under Count 2 was not briefed by the parties in their filings that preceded the initial panel decision. In the district court, Kansas conceded that Petitioners possessed Article III standing to raise their claim of enforcing § 1623, and the district court "agreed" that Petitioners had such standing. *Id.* 50a. Thus, the parties had no reason to argue that point in their appellate briefs and did not do so. When, in its opinion denying rehearing, the appeals court discussed arguments raised by Petitioners regarding Count 2, it was pulling those arguments out of context. Arguments made by Petitioners in their appellate brief regarding the nature of their Count 2 claims related to their assertion that they were entitled to bring an action to enforce § 1623, not to any arguments about their Article III standing with respect to Count 2. Accordingly, the appeals court was mistaken in suggesting, *id.* 101a, that Petitioners somehow intended that the injury-in-fact inflicted on them by K.S.A. § 76-731a was being asserted only with respect to their equal protection claims, and not with respect to their § 1623 claims.

Amici write separately in order to focus on just how severely the decision below conflicts with this Court's precedents. The Court held in *N.E. Fla. Chapter of Assoc. General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), that when one is competing with others for a public benefit, the "injury in fact" necessary to establish Article III standing to raise an equal protection challenge is "the inability to compete on an equal footing." *City of Jacksonville*, 508 U.S. at 666. In apparent recognition of that holding, the Tenth Circuit held that K.S.A. § 76-731a did indeed impose injury-in-fact on Petitioners because it denied them "equal footing" – it permitted many illegal aliens to attend college at reduced tuition rates while making it virtually impossible for U.S. citizens who are not residents of Kansas to qualify under that same statute for the reduced rates. The appeals court nonetheless held that Petitioners lacked Article III standing to assert an Equal Protection challenge to K.S.A. § 76-731a because they failed to establish the other prerequisites for standing: a showing that their injury was directly traceable to the complained of action and a showing that a judgment in their favor would redress their injury. Pet. App. 14a-17a.

The appeals court arrived at that conclusion only by engaging in some sleight of hand: for purposes of determining traceability and redressability, it revamped the nature of Petitioners' injury-in-fact claim. The court redefined Petitioners' injury from a denial of equal treatment to a denial of reduced tuition rates. By doing so, the court was able to conclude that an injunction against enforcement of K.S.A. § 76-731a would not redress Petitioners' injury because it would not provide Petitioners with any financial benefit – they would still

be required to pay tuition at higher, out-of-state rates. But *City of Jacksonville* makes absolutely clear that an equal protection claimant whose injury consists of unequal treatment can establish traceability and redressability by establishing that his or her requested relief would eliminate the unequal treatment. *City of Jacksonville*, 508 U.S. at 666 n.5. That decision dictates that Petitioners can establish traceability and redressability by demonstrating that an injunction against enforcement of § 76-731a would eliminate the unequal treatment of which Petitioners complain – and Kansas does not dispute Petitioners ability to make such a demonstration. Review is warranted to resolve the conflict between the decision below and the decisions of this Court, particularly *City of Jacksonville*.

Review might not be warranted if the decision below were merely an isolated aberrant decision; the Court does not sit to correct every misapplication of precedent. But the decision below is not an isolated decision; it is part of a pattern of Tenth Circuit decisions that have denied standing to numerous litigants that meet this Court's Article III standing requirements. The Tenth Circuit appears unwilling to accept the teachings of *City of Jacksonville* and is particularly prone to invoke its restrictive standing rules when, as here, the plaintiffs are raising claims that have generated significant public controversy. Review is warranted to resolve this persistent conflict between Tenth Circuit standing doctrine and the teachings of this Court.

Review is also warranted to resolve whether a claimant lacks standing to assert a violation of a federal statute if a court determines that the statute does not

confer a private right of action on the claimant. The Tenth Circuit answered that question affirmatively in determining that Petitioners lacked standing to assert that K.S.A. § 76-731a violates their rights under 8 U.S.C. § 1623. That decision conflicts with numerous decisions of this Court that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (emphasis in original). The Tenth Circuit did not dispute that § 1623 at least *arguably* authorizes U.S. citizens to seek redress when they are discriminated against (in favor of illegal aliens) in the award of reduced college tuition rates. By nonetheless holding that U.S. citizens such as Petitioners lack standing to raise such claims, the appeals court prevented any meaningful consideration of Petitioners' claim that Congress authorized suits by those aggrieved by blatant violations of § 1623.

In its order denying rehearing, the Tenth Circuit sought to bolster its no-standing-to-assert-a-violation-of-§ 1623 argument by asserting that Petitioners' § 1623 standing claims were deficient for the same reasons that Petitioners' standing claims were deficient with respect to their equal protection cause of action. Pet. App. 101a n.5. Accordingly, review is also warranted on the § 1623 cause of action for the same reasons that review is warranted on the equal protection cause of action. In both instances, the appeals court's holding regarding Article III standing squarely conflicts with decisions of this Court.

I. REVIEW IS WARRANTED BECAUSE TENTH CIRCUIT CASE LAW SQUARELY CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE REQUIREMENTS TO ESTABLISH ARTICLE III STANDING

The Court has explained Article III standing requirements as follows:

> The irreducible constitutional minimum of standing contains three requirements. . . . First, and foremost, there must be alleged (and ultimately proven) an "injury in fact" – a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" . . . Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. . . . And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury.

Steel Co., 523 U.S. at 102-103 (citations omitted).

A. The Equal Protection Claim

With respect to Petitioners' equal protection claim, the appeals court held that Petitioners met the first requirement (injury-in-fact) but failed to meet the other two requirements: a fairly traceable connection between the injury and the complained-of conduct ("traceability") and redressability. The court held that Petitioners established injury-in-fact by, *inter alia*,

alleging that K.S.A. 76-731a treated them less well than certain illegal aliens.[10]

In light of that holding, the appeals court's subsequent holdings regarding traceability and redressability conflict sharply with this Court's precedents. *City of Jacksonville* held not only that the injury-in-fact necessary to establish Article III standing to raise an equal protection challenge is "the inability to compete on an equal footing," *City of Jacksonville*, 508 U.S. at 666, but also that such unequal-treatment injury is to be deemed: (1) directly traceable to the complained-of statute that imposes the unequal treatment; and (2) redressable by a lawsuit seeking to enjoin the statute. *Id.* at 666 n.5. The appeals court came to a contrary conclusion regarding redressability by switching the nature of the injury at issue – from unequal treatment to a denial of reduced tuition rates.

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[10] Among the provisions of the statute to which Petitioners object are § 76-731(b)(2)(A) and (B), which restricts the statute's benefits to those who attended and graduated from a Kansas high school. Many illegal aliens can meet those requirements and thus have been able to attend Kansas universities at reduced tuition rates. In this significant respect, Petitioners are treated less well than many illegal aliens because they (and almost all other nonresident U.S. citizens) cannot meet those requirements. One exception to that general rule is *amicus* Brigette Brennan who, although she grew up in Missouri, attended a high school across the border in Kansas. But Kansas (which is alleged to have intended this discrimination against nonresident U.S. citizens) ensured that nonresident U.S. citizens such as Brigette Brennan would not be able to slip through the cracks: it added § 76-731a(c)(2), which disqualifies anyone who is eligible for in-state tuition rates in another State. Because every U.S. citizen qualifies as a domiciliary resident of at least one State, § 76-731a(c)(2) disqualifies Brennan and every other U.S. citizen who is not a resident of Kansas.

The court said that an injunction barring Kansas from using § 76-731a to offer lower tuition rates to illegal aliens would not redress Petitioners' injury – they would still be paying tuition at higher, out-of-state rates. Pet. App. 16a-17a. That redressability analysis directly conflicts with *City of Jacksonville*, under which an injunction against future unequal treatment of Petitioners would be deemed sufficient to meet the redressability requirement.

Numerous subsequent decisions of this Court have confirmed *City of Jacksonville*'s view that a suit to prevent future unequal treatment and alleging violations of the Equal Protection Clause satisfies Article III standing requirements. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) ("The aggrieved party need not allege that he would have obtained the benefit but for the barrier in order to establish standing"); *Texas v. Lesage*, 528 U.S. 18, 21 (1999); ("[A] plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered."); *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (upholding standing to challenge racially preferential college admissions requirements; "[t]he 'injury in fact' necessary to establish standing in this type of case is the denial of equal treatment resulting from the imposition of the barrier, not the inability to obtain the benefit."); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2751 (2007) (upholding standing to challenge an allegedly discriminatory student assignment system).

The Equal Protection Clause requires that the

government treat similarly situated individuals in a similar manner, unless it can demonstrate a proper basis for distinguishing those individuals. *See, e.g., Zobel v. Williams,* 457 U.S. 55, 60 (1982) ("When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment."). Kansas may contend that it has a proper basis for treating illegal aliens more favorably than it treats Petitioners, but that contention goes to the merits of Petitioners' equal protection claims, not to their standing. Because Kansas cannot contest that Petitioners are being treated less favorably, the Tenth Circuit's holding that Petitioners lack Article III standing cannot be squared with this Court's precedents.

Those precedents make clear that to establish redressability, it is enough to demonstrate that if relief were granted, the complained-of injury (*discriminatory* denial of in-state rates) would end. While Petitioners undoubtedly would prefer Kansas to choose to extend in-state rates *both* to illegal aliens *and* to U.S. citizens from outside Kansas, their injury would also be redressed if Kansas chose instead to cease awarding in-state tuition rates to illegal aliens. The Court has never required an equal protection plaintiff to demonstrate that success in litigation would result in financial gain, in order to demonstrate her standing. For example, the result in *Zobel*, in which the Court invoked the Equal Protection Clause to strike down an Alaska "dividend" program that provided greater payments for long-term Alaska residents than for newcomers, was to end *all* payments – even those to the plaintiffs. *Zobel*, 457 U.S. at 61-65. Yet, the Court never suggested that the plaintiffs lacked standing because the result of their

claims was to place themselves in a worse financial position.

The appeals court also asserted that Petitioners could not demonstrate traceability and redressability because they could not possibly qualify for benefits under § 76-731a since they had not attended and graduated from a Kansas high school. Pet. App. 16a-17a. The court deemed the high school attendance/graduation requirement (K.S.A. § 76-731a(b)(2)(A) & (B)) to be a "nondiscriminatory prerequisite for benefits under § 76-731a, regardless of the citizenship of the students." *Id.* 17a. That assertion is utterly meritless as a basis for denying standing and finds no support in the Court's caselaw. The constitutionality of a law that grants tuition preference to illegal aliens who graduated from Kansas high schools, over U.S. citizens who did not, is the central merits question in this lawsuit; a federal court may not assume the answer to that question as its basis for denying standing.[11]

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[11] The district court quoted *Vlandis v. Kline*, 412 U.S. 441, 452-53 (1973), for the proposition that "a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis." Pet. App. 57a-58a. But that statement similarly goes to the merits of Petitioners' claims, not to their standing. Moreover, the district court's citation to *Vlandis* overlooks that Petitioners are not complaining about being treated less well than Kansas's "bona fide residents." Rather, they complain about being treated less well than illegal aliens who are violating federal laws and who (like Petitioners) are physically present in Kansas but are not domiciliary residents of the State. This Court has never suggested that a State has a "legitimate interest" in treating such lawbreakers better than it treats nonresident U.S. citizens.

As noted above, the decision below is not an aberration within the Tenth Circuit. The appeals court's novel interpretation of *City of Jacksonville* – unequal treatment constitutes injury-in-fact in an equal protection case, but an injunction against future unequal treatment is insufficient to establish redressability for Article III standing purposes – has been adhered to in a number of Tenth Circuit decisions over the past decade. Indeed, while the appeals court on multiple occasions has cited *City of Jacksonville* for the proposition that unequal treatment can constitute injury-in-fact, *amici* are unaware of a single instance in which the court ruled that an equal protection plaintiff had standing where the *only* injury-in-fact claim was that he had been subjected to unequal treatment.

For example, in *Cache Valley Electric Co. v. Utah Dep't of Transportation*, 149 F.3d 1119 (10th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999), the Tenth Circuit held that a contractor lacked standing to assert an equal protection challenge to a contract set-aside program that employed racial and gender preferences. The court conceded that, under standing rules established in *City of Jacksonville* and *Adarand*, the plaintiff contractor had established injury-in-fact. *Id.* at 1122. The court nonetheless held that the plaintiff had failed to establish redressability because the plaintiff had not demonstrated that elimination of the racial and gender preferences would necessarily lead to an increase in the number of government contracts it received. *Id.* at 1123. In other words, elimination of the very injury-in-fact identified by the appeals court was insufficient to constitute redress for Article III standing purposes. Other post-*City of Jacksonville* cases in which claimants alleging discriminatory treatment have been denied

standing by the Tenth Circuit based on restrictive understandings of traceability or redressability include *Fuller v. Norton*, 86 F.3d 1016, 1027 (10th Cir. 1996); and *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996). *See also Nova Health Systems v. Gady*, 416 F.3d 1149 (10th Cir. 2005) (plaintiff challenging constitutionality of Oklahoma parental notification law established injury-in-fact, but Article III standing found lacking based on failure to establish redressability).

As the Petition demonstrates, the decision below conflicts with the understanding of at least four other federal appeals courts regarding the standing of equal protection claimants who allege unequal treatment. *See* Pet. 25-33. Review is warranted based both on that conflict and the conflict between the decision below and the decisions of this Court.

B. The § 1623 Claim

The Tenth Circuit also held that Petitioners lacked standing to challenge K.S.A. § 76-731a as a violation of 8 U.S.C. § 1623. The appeals court arrived at its "no standing" holding based solely on its determination – after a cursory review of § 1623 – that the statute was not intended to confer a private right of action on Petitioners. Review is warranted because this Court has resoundingly rejected assertions that Article III limits federal court jurisdiction in that manner; the Court has repeatedly held that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89 (emphasis in original).

Section 1623 is, in a sense, an "equal protection" statute for U.S. citizens seeking favorable tuition rates at public universities located outside their State of residence. Section 1623 does not limit the power of States to offer reduced, in-state tuition rates to illegal aliens. It merely requires that *if* a State chooses to offer reduced rates to illegal aliens "on the basis of residence," they must offer those same rates to *all* U.S. citizens, even citizens who are not residents of the State. By demanding that nonresidents U.S. citizens be offered benefits "in no less an amount, duration, and scope" than the benefits offered to illegal aliens, § 1623 conveys Congress's intent that nonresident U.S. citizens be placed on an "equal footing" with illegal aliens. When one views § 1623 in that manner, there is substantial basis for surmising that Congress adopted the statute for the purpose of benefitting U.S. citizens and thus that it intended to permit U.S. citizens to take steps to secure those benefits (by filing suit under 42 U.S.C. § 1983).

But the Tenth Circuit never reached the question of whether Congress had intended private enforcement of § 1623. Instead, it short-circuited a thorough statutory analysis by holding that Petitioners lacked Article III standing to raise the claim (because, based on a preliminary review, it determined that § 1623 was not intended to confer any rights on private citizens), and thus that the court lacked subject matter jurisdiction even to address the private-right-of-action question. That ruling conflicts with caselaw of this Court going back more than a century. As the Court explained in *Bell v. Hood*, 327 U.S. 678, 682 (1946), "jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." Rather, federal courts have

jurisdiction if "the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," *id.* at 687, unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial or frivolous." *Id.* at 682-83. "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co.*, 523 U.S. at 89 (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)).

As an alternative basis for dismissing Count 2 (the § 1623 claim) based on lack of standing, the Tenth Circuit said that Petitioners' § 1623 injury-in-fact claims were deficient for the same reasons that the equal protection injury-in-fact claims were deficient. Pet. App. 101a n.5[12] Accordingly, review is also warranted on the § 1623 cause of action for the same reasons that review is warranted on the equal protection cause of action. Petitioners contend that Kansas's violations of § 1623 have injured them by preventing them from competing on an "equal footing" with illegal aliens. That injury-in-fact is identical to the injury-in-fact they allege has been

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[12] This alternative argument is somewhat mystifying, given that the appeals court had not faulted Petitioners' equal protection claim in this respect – it found that Petitioners had, indeed, adequately demonstrated injury-in-fact. Presumably, the appeals court meant to cite its findings that Petitioners had failed to demonstrate traceability and redressability.

inflicted on them by Kansas's violations of the Equal Protection Clause. By granting review, the Court can resolve the conflicts (both between the Tenth Circuit and this Court, and between the Tenth Circuit and other federal appeals courts) regarding how one measures traceability and redressability with respect to such injuries-in-fact.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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